IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.1485 OF 1998

1.Shantilal Chakurbhai Rathod
2.Shantinath Builders Pvt.Ltd. ...Plaintiffs

vs.

Satish Shankar Gupte ...Defendant

Mr.Rajesh Shah for the Plaintiffs

CORAM: A.S.OKA,J.
DATE : SEPTEMBER 26,2007

JUDGMENT:

1. The suit is listed under the caption 'Undefended suits for exparte decree'. The plaintiffs have filed an Affidavit of the first plaintiff Shri Shantilal Rathod for proving the claim in the suit. The plaintiffs have also filed an Affidavit of Shri Harshad Maniyar. The plaintiffs have also filed various documents in support of their case.

2. The suit is filed for specific performance of oral agreement for sale of the suit property the terms of which have been set out in paragraph 4 of the plaint. In the alternative there are two prayers. The first is for a decree of damages in the sum of Rs.4,80,00,000/- and the second is for refund of consideration of Rs.20,00,000/- together with interest.

3. The suit property is plot Nos.702 and 704 of Town Planning Scheme No.IV of Mahim Division together with structures standing thereon. According to the case of the plaintiffs, at the relevant time there were three buildings existing on the suit property. The existing structures viz. building Nos.1 and 2 were to be demolished. According to the case of the plaintiffs, two new buildings were proposed to be constructed. Building No.2 was to be constructed for housing the existing tenants. The tenants in the existing building no.2 were to be shifted to the existing building No.3. Subsequently, the existing building no.2 was to be demolished for making the provision of recreation garden.

4. The first plaintiff is a builder and developer. There was a meeting between the first plaintiff and the defendant who is the owner of the suit property. According to the case of the plaintiffs, the defendant agreed to sell the suit property at the price calculated at the rate of Rs.1600/- per sq.ft for the purpose of construction. According to the agreed terms, it was the responsibility of the defendant to shift the existing tenants to the existing building No.3. The parties were to submit form No.37-I for the purpose of obtaining no objection certificate. The first plaintiff was to act as a promoter of the second plaintiff. The transaction was entered into for the benefit of the second plaintiff. The plaintiffs agreed to pay a sum of Rs.2,00,000/- initially to the

defendant as an earnest money and the balance amount of Rs.18,00,000/- was to be paid by instalments as set out in the paragraph 4 of the plaint. The building for the existing tenants was to be constructed at the cost of the defendant. It was alleged that till the time no objection certificate of the appropriate authority was received, the agreement was to be treated as an intention of the parties to enter into an agreement for sale by the defendant in favour of the plaintiffs contingent upon no objection certificate from appropriate authority. It was agreed that the title of the defendant was found to be clear and marketable. According to the case of the plaintiffs they have paid a sum of Rs.2,00,000/- by way of earnest money by a cheque. The plaintiffs have set out in the paragraph 5 of the plaint that the further consideration of Rs.18,00,000/- was paid as per the details set out in the said paragraph.

5. The plaintiffs have alleged that in the year 1994 they forwarded a draft of the agreement to the defendant. The said draft was returned in September 1995 by the defendant after making certain changes.

6. The plaintiffs have set out in the plaint the terms and conditions incorporated in the draft agreement. In the plaint, it is alleged that the defendant purportedly tried to show that the agreement was not an agreement for sale but only

an agreement for development. He has substituted the word development in place of sale in the draft forwarded by the plaintiffs. According to the case of the plaintiffs, there was a meeting between the parties after the corrected draft agreement was received by the plaintiff from the defendant. According to the case of the plaintiffs, it was agreed in the meeting that the defendant was bound to enter into an agreement for sale and not merely for development. It was also agreed that after the joint meeting with the Advocates, the defendant would execute the agreement for sale not only to give effect to the terms and conditions as aforesaid but will also fill in the form 37-I for being submitted to the appropriate authority.

7. The plaintiffs have referred to the public notice issued on 7th September 1995 in respect of the suit property, where it was alleged that there was an agreement for sale executed in respect of the suit property in favour of the clients of M/s.Kirit Damania and Company, Solicitors. It is alleged that the defendant informed the plaintiffs the clients of M/s.Kirit Damania & Co. had no claim in respect of the suit property. An objection was raised by the Advocate for the plaintiffs by writing a letter on the basis of the said advertisement. There was a public notice which appeared in the ‘Free Press Journal’ on 28th November 1996 of M/s.Solemn & Co., Solicitors in which it was mentioned that the Defendant had agreed to

sell the property to their clients. In view of the said advertisement, the present suit has been filed by the plaintiffs.

8. As stated earlier, the defendant has not chosen to defend the suit and therefore, the suit has been listed under the caption 'Undefended suits for exparte decree'. The plaintiffs have produced the receipts, evidencing the payment of a sum of Rs.20,00,000/- by them to the Defendant. The first plaintiff in his affidavit has set out the terms and conditions agreed by and between the parties. He has stated that the receipts which are produced along with the list have been signed by the defendant in his presence. The plaintiffs have therefore proved the said receipts. The receipts contain the description of the suit property. A draft of the agreement forwarded by the plaintiffs to the defendants is also produced. The first plaintiff in paragraph 6 of its affidavit stated that the defendant returned the said draft in September 1995 after making certain changes therein. He has stated that the said changes made in the draft were in the handwriting of the defendant. Thus, the plaintiffs have proved that they have paid a sum of Rs.20,00,000/- to the defendants. The fact that the draft of the agreement for sale was forwarded to the defendant and the same was returned by the defendant after carrying out corrections therein has also been established by the plaintiffs. Perusal of the draft shows that in the

recitals at the place where the name of the second plaintiff-company was incorporated as the purchaser, the defendant has carried out correction by describing the said company as a developer. However, clause 1 of the draft where the 2nd plaintiffs are described as purchasers of the property has been kept intact.

10. The original advertisement referred to in the plaint published on 7th September 1995 and 20th November 1996 have also been produced by the plaintiffs. The plaintiffs have also raised an objection in writing through their Advocate to the Advocates who had published the notice dated 7th September 1995. The office copy of the said letter which has been produced bearsthe acknowledgment of the said Advocates. In the affidavit it is stated that on 26th November 1996, an objection was submitted in writing by the Advocates for the plaintiffs to M/s.Solemen & Co. who had published the notice dated 20th November 1996. It is stated that the office copy of the letter dated 26th November 1996 has been misplaced Therefore, a permission is sought to lead a secondary evidence by producing a typed copy of the said letter.

11. The prayer made in the plaint is for declaration that oral agreement between the parties the particulars which are set out in paragraph 4 of the plaint is valid and subsisting and binding on the Defendant. The second prayer reads thus :

(b) That the defendant may be ordered, decreed and directed to specifically perform the said agreement mentioned in prayer (a) above by:-

i) entering into a formal agreement to sell the said property to the plaintiffs in terms of the terms and conditions agreed upon and referred to in paragraph 4 of the plaint above;

ii) filling in and signing Form No.37I, under the Income-Tax Act,1961 and submitting the same to Appropriate Authority with a view to obtain No Objection Certificate for the said transaction and to do all acts, deeds, matters and things necessary or requisite thereon;

iii) making his title clear and marketable to the said property and submitting a Title Certificate from his Advocate of the marketability of the said property.

12. Thus, the substantive prayer made is for enjoining the defendant to execute a formal agreement for sale in terms of the oral agreement set out in paragraph No.4 of the plaint.

13. The existence of oral agreement between the parties has been duly proved by the Affidavit of the first plaintiff and the documents which are produced on record. The payment of a sum of Rs.20,00,000/- by the plaintiffs to the Defendant has also been duly proved by the plaintiffs. The readiness and willingness of the plaintiffs to comply with the agreed terms has been duly established. There is no impediment in passing a decree for specific performance as prayed. Therefore, a case is made out for passing a decree in terms of prayer clauses (a) and (b).

14. Hence, I pass the following order :

. The suit is decreed in terms of prayer clauses (a) and (b) and (i).

. The plaintiffs will be entitled to refund of court fees, if any, as per the rules.

. Certified copy is expedited.

JUDGE